IN RE ARBITRATION BETWEEN:

CITY OF RED WING, MN

and

IAFF, LOCAL 2078, RED WING, MINNESOTA

DECISION AND AWARD OF ARBITRATOR
BMS CASE # 16-PA-0859

JEFFREY W. JACOBS

ARBITRATOR

July 25, 2016

IN RE ARBITRATION BETWEEN:

City of Red Wing, MN,

and

DECISION AND AWARD OF ARBITRATOR
BMS CASE # 16-PA-0859
Peter Hanlin grievance

IAFF, Local 2078, Red Wing, Minnesota

APPEARANCES:

FOR THE UNION:	**FOR THE CITY:**
Diana Nobile, Woodley and McGillivary	Amy Mace, Rupp, Anderson, Squires and Waldspurger
Peter Hanlin, grievant, Local President	Tom Schneider, former Fire Chief
Benjamin Roser, former Red Wing firefighter	Scott Myers, Firefighter, Paramedic & CIT
Matthew Lenz, Firefighter, Paramedic & CIT	Stacie Hawkins, Employer Services Director
	Kay Kuhlmann, City Administrator

PRELIMINARY STATEMENT

The hearing in the above matter was held on June 9, 2016 at the Red Wing, MN City offices. The parties presented oral and documentary evidence at which point the hearing record closed. The parties submitted briefs dated July 8, 2016.

ISSUE PRESENTED

The City stated the issue as follows:

Whether the discipline of the Grievant is just and fair and supported by reasonable cause as provided in Article 9 of the collective bargaining agreement?

The union submitted an extensive statement of the issues as follows:

1. Whether the City of Red Wing violated Article 9 of the Labor Agreement between Local 2078 and the City of Red Wing, in issuing discipline against Peter Hanlin that was not supported by just, fair and reasonable cause;

2. Whether the City carried its burden of proving, by a preponderance of the evidence, that Peter Hanlin engaged in behavior constituting violations of Categories Two and Three of the Inappropriate Workplace Behavior Continuum of the Personnel Policy Manual of the City of Red Wing, and as alleged by the City in its response to the Union's grievance;

3. If the City of Red Wing proved it had just, fair and reasonable cause by a preponderance of the evidence, whether the discipline imposed is appropriate in light of the City's past practice, the Labor Agreement, and the Respectful Workplace Policy and Inappropriate Workplace Behavior Continuum in the Personnel Policy Manual, which sets out a progressive system of discipline;

4. Whether any additional relief, including an award of back pay and attorneys' fees, is appropriate under the circumstances.

The arbitrator after a review of the evidence and written submissions in the case determined that the issue as follows: Did the City have just cause to impose the disciplinary suspension that was issued in this case to the grievant? If not, what is the appropriate remedy?

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from January 1, 2015 to December 31, 2015. Article 8 provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the State of Minnesota BMS. There were no procedural arbitrability issues raised by either party and it was agreed that the matter was properly before the arbitrator.

RELEVANT CONTRACT PROVISIONS

ARTICLE 9 – DISCIPLINE

The Employer will discipline employees for just, fair and reasonable cause only. The Discipline shall be in the form of:

A. Oral Reprimand
B. Written reprimand
C. Suspension without pay
D. Demotion, or,
E. Discharge

PARTIES' POSITIONS

CITY'S POSITION

The City's position was that there was just cause for the grievant's suspension. In support of this position the City made the following contentions:

1. The grievant is aware of the need to remain respectful and appropriate toward members of supervisory staff and other employees. He is a Captain in training, CIT, and as such is expected to know and abide by the rules of the department and may be expected to one day be responsible for enforcing those rules. He is also expected to exhibit professional and appropriate workplace behavior at all times, especially since he is a CIT and is being trained for a leadership role. As such he is expected to meet a higher standard of conduct.

2. The grievant was well aware of the need to refrain from insulting, degrading or derogatory statements about his co-workers and the need to be respectful of command staff. Angry outbursts intimidation or other forms of workplace harassment and threats, including verbal threats are prohibited and inconsistent with a respectful workplace, especially in a paramilitary environment. The grievant is a relatively short term employee, having established no "bank of good will" as a longer term employee might.

3. The City noted that there were few if any disputes about the underlying facts of the case. On August 27, 2015, the grievant was scheduled to go off shift at 7:00 a.m. He learned that the incoming captain had called in sick that day. The captain of the outgoing shift specifically informed the grievant that he would inform the oncoming shift that they would need to call in another captain to oversee the shift and the training that was scheduled that day.

4. Despite being told this by the outgoing captain, the grievant, in what the City called a highly inappropriate decision, took it upon himself to go on the PA system, which broadcasts throughout the entire station, announcing to anyone who could hear that their "piece of shit captain" has called in sick.

5. The City asserted that everyone who heard this were somewhat shocked and surprised; several physically cringed and many felt that this was a very inappropriate statement to make. While there was no member of the public in the station at that time, there could have been and it was not clear that the grievant ever considered that or what would have been the reaction if anyone from the public or other city employees had happened by and been within earshot of the PA system.

6. The City further noted that its respectful workplace policy specifically prohibits the use of "offensive or degrading remarks or conduct." The policy also defines "offensive behavior" as conduct that "may include, but is not limited to, such actions as rudeness, angry outbursts . . . disrespectful language or any other behavior regarded as offensive to a reasonable person. See Joint Exhibit 5.

7. The grievant was also aware of this policy and as a CIT, would be responsible for exhibiting behavior consistent with that policy – not completely contrary to it. His behavior clearly "crossed the line" and violated the language and the spirit of that policy.

8. The City also countered the claim that all conduct must fit neatly into the verbiage of the policy, as asserted by the union. The policy provides in relevant part as follows:

> Listed below are examples of inappropriate workplace behavior along with the recommendation for action for most situations. The City reserves the right to disregard the recommended action if it believes that stricter action is warranted. This list does not cover all situations. Joint Exhibit 5.

9. The policy further provides that "The City of Red Wing reserves the right to determine a course of action that will deviate from this guideline." The City argued that the language clearly allows for discretion to apply the policy for behavior that violates the admonition against workplace harassment and which violates the respectful workplace policy.

10. The City further asserted that this was not a "joke" as the union and the grievant suggested and that no one took it as a joke. As further evidence of that, the City noted that the grievant then went into the room where the shift was gathered and continued to berate the other captain and angrily confronted other employees trying to persuade them to his view of things. Other employees who were there also did not take the comments as a joke. One employee who was there and heard the PA announcement verified that the grievant was not very happy about the Captain calling in sick on a training day; in fact, he appeared visibly upset and continued to berate the Captain and calling on the other employees to assist him in doing something about it. The only person who was making the negative comments about the Captain was the grievant. No one else made such statements. The Grievant referred to the Captain as a "piece of shit captain" several times and no one else said anything of the sort.

11. The employees, including the one who testified, felt "pretty uncomfortable" after the grievant made the comment over the P.A. system. The witness stated that comments were unprofessional "obviously," and that everyone in the room, including himself, cringed when they heard the comment over the PA system. The City asserted that this was no joke and was not mere shop talk or idling bantering around.

12. The City also noted that the captain was in fact ill that day and that the City Administrator actually saw him later that day going into a drug store to purchase pain killers to deal with a pre-existing back injury. However, whether that Captain was sick or not was not the question in the City's eyes. What was, at issue, was the unauthorized and inappropriate use of the PA system to announce that the "piece of shit captain" had called in sick. If the grievant had a concern that the other captain had called in sick without reason, he needed to follow the chain of command and bring that to the proper command staff – not gratuitously grab the PA system and call that Captain a "piece of shit." The City characterized that as outrageous behavior that was disrespectful of command staff and an insult to a superior officer.

13. The City also noted that the grievant continued to try to persuade and even intimidate other employees to his view. He found another firefighter in the bay area and effectively tried to browbeat him to his side. When that firefighter refused to agree with the grievant, the grievant called him a "F**cking idiot" and stormed away. The City acknowledged that the other firefighter did not admit that he felt "intimidated" by the grievant, but that firefighters are rarely going to admit fear or intimidation due to the nature of their relationship and their work. The City asserted though that the clear intent was to verbally harass the other firefighter and to try to intimidate him. The City noted that the other firefighter whom the grievant confronted in the garage bay characterized the grievant as a "bully" in his initial statement regarding this incident. From that it should be presumed that he felt intimidated to some degree and that the words "f**king idiot" were offensive in that context and an attempt to abuse his power as a CIT and as the local union president.

14. The City also acknowledged that sometimes coarse and even profane language is used around a fire station but that this use of the "F" word and the clear attempt to intimidate was well beyond normal "shop talk."

15. The City went through the well-established elements of just cause and argued that it met all such elements in determining whether there was cause for discipline and in determining the appropriate degree of discipline necessary to correct the behavior without being punitive. The grievant had clear notice of the respectful workplace policy, set forth above. That rule is both reasonable and was applied even-handedly here. A rule against disrespectful or intimidating workplace behavior is critical in virtually all workplaces but especially in a workplace environment where firefighters must place their lives in each other's hands when performing their difficult and often very dangerous duties.

16. The City asserted that the investigation was both thorough and fair. There was no dispute about what happened – the grievant acknowledged that he used the PA system and that he used the words as alleged above. He further admitted that he confronted other firefighters both in the staffing room as well as another firefighter in the garage bay. While he denied that he tried to intimidate anyone, there was no question that he angrily confronted several people in an effort to convince them to be as outraged as the other captain calling in sick and that his intent was clearly to try to intimidate and bully people to agree with him.

17. The City did not dispute that the grievant is a dedicated firefighter and that his commitment to safety of the public and the firefighters is admirable but that he needs to channel this passion in a more appropriate way by being respectful to co-workers and command staff and to follow chain of command with any issues of this nature. He could certainly have done that but chose to not only usurp the PA system but then effectively "doubled down" on his comments by continuing the tirade to a group and to at least one individual in a very belligerent manner.

18. The City also noted that the discipline meted out had the exact desired effect and that the grievant now knows and acknowledges that he will not act this way in the future. That however is no reason to remove it but serves as support for the notion that it was necessary to impress upon him the needs to act more appropriately in the future. The one-day suspension and reprimand was thus appropriate and commensurate with the severity of the conduct.

19. The City countered the claim of disparate treatment and noted that in many of the cases cited by the union the City Administrator was not involved or did not know of the allegations. Further, none of the other employees who either used foul language or who were disrespectful used the PA system to announce to the rest of the firefighters within earshot that a Captain was a "piece of shit" and then continued the intimidation by angrily confronting other employees to browbeat them into agreement with their opinions.

20. One instance involved one employee calling another a "smartass." See Testimony of Brian Roser. While this is perhaps inappropriate language, the City argued that it pales by comparison to the instant case. It did not involve the same sort of offensive language as the grievant used that day, did not involve announcing it over the PA system, did not involve a public display of disrespectful behavior and was essentially an accusation of a Captain falsifying his request for sick leave.

21. The City argued that the other instance testified to by former firefighter Roser in which former Chief Schneider made a comment about getting on his knees [to try out some knee pads] was also irrelevant. That was a failed attempt at humor that turned out badly. There was no PA announcement, no questioning of the integrity of another employee and there was an immediate and sincere apology. The City asserted that this incident is vastly different for all the reasons above.

22. The City Administrator reported herself and received a reprimand for saying "this is bullshit" during a meeting with the union and other employees in response to a comment that if one works for the City of Red Wing, you must not care, or words to that effect.

23. She took offense to that unsubstantiated criticism. While those words were coarse, they did not compare to publicly calling a superior officer a "piece of shit." Ms. Kuhlmann testified that if she called a member of the City Council she would expect to be fired, not suspended.

24. Other employees have received suspensions for insubordinate or disrespectful behavior toward supervisors. None however used the same words or used the PA system to announce their displeasure. The cases cited by the union were thus very different from that presented here.

25. The City also asserted that there is absolutely nothing to the allegations by the union that the grievant's position as local union president had anything to do with the decision to impose discipline. While that was mentioned in the final determination letter from the City Administrator, it was obvious in that letter that she was praising his service in that role and for his Service to the City and the Fire Department. There was no anti-union discrimination at all in this.

26. In addition, the grievant's so-called apology was more of a justification or excuse for his actions than a true apology. For one thing, he stated that he "stands behind the point he was making" about the Captain calling in sick. He further indicated that while he was willing to resign as president he did so by stating: "I am definitely not the person to represent a group that is willing to accept and make excuses for one of our members who is engaging in a behavior that affects the safety of others to a point at which it becomes a joke. In my opinion there is no excuse for those of us who choose to just show up with no intention of making ourselves or the department better, and unfortunately it's not always just our captains who fit this description."

27. The City asserted that this is hardly a sincere apology and that the grievant still does not understand as of the time he wrote this apology letter the true impact of what he did. While he may have understood it later, it was due to the imposition of discipline that he was able to finally understand the gravamen of his actions and the need to correct and amend his behavior.

28. Finally, the City asserted adamantly that there are no contractual, statutory or legal grounds for the award of attorneys fees. The contract does not call for it, even if the arbitrator sustained the grievance in its entirety. The jurisdiction derives from the contract and there is no provision that allows for attorneys fees under PELRA or the labor agreement.

29. Minn. Stat 572B.21 allows for the award of attorneys fees "if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding." The City argued that the grievant's claim does not stem from a civil action nor could it. It is exclusively a matter arising out of the contract. Thus, as a matter of law, there are no grounds for an award of fees. Further, even if by some measure the arbitrator finds a basis for attorneys fees, no such fees could be awarded here since the union's representative is not licensed to practice law in Minnesota.

The City seeks an award of the arbitrator denying the grievance in its entirety.

UNION'S POSITION:

The union's position was that there was not just cause for the discipline. In support of this the union made the following contentions:

1. The union noted that the grievant is an excellent employee who has been with the City for 5 years. He has an exemplary record and is a CIT due to his excellent work ethic and devotion to safety, public service and his leadership capabilities as determined by the very city administration that now wants to discipline him. He has no prior discipline whatsoever and is regarded as a leader both in his capacity as a firefighter as well as his service as local union president.

2. The union also noted throughout the process that some coarse language and good natured joking and veiled insults are part of the workplace and are regarded as normal shop talk. Firefighters spend considerable time together and develop a close comraderie.

3. As a result of this close personal relationship, they often banter with each other and language of the type used here is commonplace and is not regarded as any big deal. The events in question were just good natured joking. No one should have been offended or surprised and there were no members of the public or other departments in the station at the time.

4. The union noted that there was no direct evidence that anyone felt offended or intimidated by the comments over the PA system nor by the grievant's actions in coming to the meeting room to elicit support for his position that mandatory meant mandatory, not discretionary, and that the Captain should have been there. Despite interviewing 17 employees, which the union characterized as an over-blown investigation, and which was essentially an effort to find something, anything with which to discipline the grievant, no one indicated that they felt abused, or intimidated by the comments either over the PA system nor when the grievant addressed the group personally.

5. The union noted that even the one firefighter the City accused the grievant of intimidating by calling him a "f**king idiot" testified that he was not offended or intimidated. He also testified that this sort of name calling is a regular occurrence and that he, along with the vast majority of the firefighters in the department, use language like this all the time. No one is surprised or offended by it and neither was he. Thus, the City's claim that the grievant intimidated or bullied another firefighter in the garage bay was simply unfounded and untrue.

6. The union also noted that the grievant is very concerned about the safety of the employees both in his capacity as a professional firefighter and as local union president. He has become very outspoken about that, believes deeply in the notion that everyone should go home at night safely and that training is of paramount importance. He was understandably upset by the Captain calling in, which he has done before, to avoid mandatory training. The grievant's ire was justifiable and he simply wanted the other employees to understand the importance of attending training for their safety and for that of the public. He believed that the captain was calling in sick, which he did frequently, not because he was truly sick but rather to avoid training.

7. In fact, that Captain's propensity for skipping mandatory training was so well known that other firefighters, including command staff, would occasionally make "bets" about whether and when he would call in sick to avoid it. These so-called "pop bets," whereby one officer would bet another a can of soda pop on whether the captain would call in sick or find some way to avoid training, were commonplace and well known among the entire department.

8. The union also asserted that the grievant's position as local union president was a factor in the decision to impose any discipline and in the decision to impose such a high level of discipline. The union noted that for some time, relations between the parties to the labor agreement have been strained. The City Administrators' memo expressing her frustration about the tense and unhealthy relationship was cited as an example of how things have deteriorated. See Union Exhibit 2. The City Administrator regarded the grievance process as a "failure" and the union asserted that the discipline was retaliation for the grievant's insistence in adherence to the labor agreement and to the process of healthy labor relations.

9. Despite the above, the grievant acknowledged that he used poor judgment in his actions and should not have used the PA system to vent his frustration nor should he have used the inflammatory language. However, he immediately took responsibility for his conduct and has promised never to repeat it. The grievant testified that he felt the whole matter was a joke and just part of the ribbing that firefighters give each other on a routine basis.

10. The union noted that while language of this nature is used routinely no one has ever been disciplined for it despite its wide use throughout the department. The union asserted that the grievant's position and the tense relationship between the union and the City underlies the decisions made here.

11. The union also argued that the degree of discipline, even if any discipline at all is warranted, was far too harsh for the grievant's actions. He immediately apologized, even offering to resign as union president, and was contrite throughout the investigative process right up and including the arbitration hearing. The penalty imposed was both a written reprimand, a one-day (24 hour) suspension along with a litany of other requirements, such as attending anger management, prohibitions against the grievant from acting in a "defensive or argumentative manner, prohibitions against using vulgar language in the future and not using the PA system for any "inappropriate" announcements. The union noted that these latter requirements run afoul of his rights as a union member and certainly as the union president and cannot be supported even if the reprimand and suspension are found to be legitimate. The imposition of these other requirements is well beyond reasonable and may well impose on the grievant's rights to act as a union official.

12. Moreover, the City's own policy calls for a verbal reprimand for the use of inappropriate or vulgar language, not both a written reprimand and a suspension. The penalty imposed here is used only for reprisals, verbal threats and abuse, weapons or destruction of City property. None of these offenses were proven here. The union argued that in many cases a verbal coaching is called for and has been used in the past for similar actions by other employees – who were incidentally not the local union president and a thorn in the side of management.

13. The union cited cases involving offensive language or other forms of disrespectful behavior and argued that the City is guilty of disparate treatment of the grievant – largely based on his position as president of the local. The union pointed to a verbal warning for the soda pop bet cited above even though it was clear that this too was an act of disrespect. The union also cited cases that ruled that similarly situated employees must be treated similarly and if not, discipline must be reduced or overturned. See, *AFSCME Council 65 and Minnesota Judicial Branch,* BMS Case No. 14-PA-0808 (Ogata 2015); *Champion Spark Plug Co*., 93 LA 1277, 1284 (Dobry 1989); *Commercial Warehouse Co*., 100 LA 247 (Woolf, 1992) and *Citizens Telecomm. Co. of Tenn*., 127 LA 55 (Frockt, 2009).

14. All the above cited cases involved a reduction or eliminating a penalty where employees who were similarly situated were treated differently or where employees who were guilty of more severe conduct received less discipline than the employee at hand. The union argued that the City has treated the grievant very differently even though other employees, even managerial employees have engaged in the same or worse conduct yet received little or no disincline at all.

15. The City Administrator herself was issued only a verbal warning for her use of the term "bullshit" in front of other staff and union members during a labor management meeting. That term is also considered vulgar and coarse yet she was issued only a verbal warning.

16. One employee called the former Chief a "jackass" in front of an entire shift of employees yet received no discipline at all. The union noted that this was a very disrespectful action yet the grievant was treated far more harshly.

17. The former Chief ordered a former firefighter to "get down on his knees" to demonstrate some new knee pads yet was issued no discipline at all for this coarse and inappropriate comment. There was also a number of other cases of coarse and vulgar language used between firefighters that resulted in either light discipline, such as a verbal warning, or in some cases a mere coaching or no consequences at all. In one case, an employee actually threw an item at another while cursing at him yet this resulted in no discipline.

18. The union argued that there was inadequate notice to the grievant that his actions were contrary to any stated policy. Given the lax enforcement noted above, he was reasonable in assuming that such language would not result in discipline. Further, some of the allegations now used by the City to support the discipline were not raised until well into the grievance process and constituted new evidence and argument and violated the grievant's due process rights. The union argued that these new allegations should not be considered.

19. The Union cited several prior arbitral decisions for the proposition that the employer must show by at least a preponderance of the evidence that there was just cause for any discipline and that the grievant's actions violated a stated and consistently enforced policy. See, e.g. *Cook Hospital and AFSCME, Council #65*, BMS Case No. 15-PA-0970 at 9 (Beens, 2016); *AFSCME, Council #65 and Traverse County, Minnesota*, BMS Case No. 16-PA-0231 (Daly 2016) and *In re Dobbs House, Inc. and Int'l Brotherhood of Teamsters*, 78 LA 749 (Tucker 1982).

20. Not only must the employer prove that the grievant committed an offense, it must also show that the degree of discipline was appropriate in light of the overall record. See, *MAPE and State of Minnesota, Department of Employment and Economic Development*, BMS Case No. 15-PA-0417 (Befort 2015). The union argued repeatedly that the amount of discipline was excessive and arbitrary and cited several cases where arbitrators have mitigated penalties where there was adequate evidence that the degree of discipline was in excess of what was reasonable under the circumstances. See e.g., *Merchants Fast Motor Lines*, 103 LA 396, 399 (Shieber 1994); *Clow Water Sys, Co*., 102 LA 377 (Dworkin 1994). and *Cummins, Inc*., 104 LA 1012, 1017 (1995); *Barnstead-Thermolyne Corp.*, 107 LA 645, 653 (Pelofsky 1996). Just cause analysis requires that there be adequate evidence of both guilt, along with adequate notice and a fair investigation, no disparate treatment, and that the penalty "fit the crime." As noted above, the union claimed that the penalty here was not only excessive but motivated by the grievant's position as a union official.

21. The discipline imposed here was thus punitive and not corrective. The City's own progressive disciplinary policy requires that discipline be corrective in nature. Here, the action taken did not comport with that stated policy and must be overturned and/or mitigated.

22. The union also argued that the City's action constituted unlawful union retaliation and claimed that it sustained its burden in that regard. It is incumbent on the arbitrator to conduct an analysis of whether, under the guise of just cause, the employer has actually attempted to treat a union official more harshly than it would have treated other employees.

23. For all the reasons set forth above, i.e. lack of notice, lax enforcement of a rule that is now being applied unduly strictly, conducting an overblown investigation, treating the grievant far more harshly and holding him to a much higher standard than other employees and imposing a more sever degree of discipline than was warranted by the proven offense, if any, showed that the City discriminated against the grievant solely because of his office in the union.

24. Lastly, the union sought attorneys fees and argued that even though the labor agreement has no provision for this, under Minn. Stat. 572B.21 an arbitrator has the authority to award fees if such an award is authorized by law in a civil action involving the same claim. The union cited *Education Minnesota v Inver Grove Heights Schools, ISD 199*, (Minn. App unpublished 2013) for the proposition that even though MN PELRA does not authorize such an award the Uniform Arbitration Act allows an award of attorneys fees. The union then asked that the arbitrator award fees and retain jurisdiction to determine the appropriate amount of such fees in this case.

The union requests that the arbitrator sustain the grievance and order that the grievant be made whole for all lost pay and contractual benefits and of the expungement of any record of the discipline. The Union also sought an order for attorneys fees and for the arbitrator to retain jurisdiction to determine the appropriate amount of the relief awarded.

DISCUSSION

FACTUAL BACKGROUND

The grievant has been with the City's fire department as a firefighter since 2011. There was no dispute that his work ethic and devotion to safety is exemplary and that he is in line to be a Captain in Training, CIT. He has had no prior discipline. He is also the local union president.

On August 27, 2015, the department was to conduct a mandatory training. The evidence showed that the grievant believes very adamantly that all affected employees including supervisory staff needs to attend training for the safety of the public and the firefighters and that mandatory means just that: mandatory.

On that day he was informed that the oncoming shift Captain had called in sick and would not be attending that training. The evidence further showed that this particular Captain has a reputation for missing mandatory training for whatever reason and that this has concerned the grievant greatly.

The evidence also showed that other employees are aware of the Captain's propensity to miss training and even take what are known as "pop bets" essentially betting in a good natured way whether the captain will miss training when it is scheduled. The stakes are a can of soda pop.

There was also evidence that on occasion, foul and even vulgar language is used and is regarded as commonplace. Firefighters spend considerable time together and develop a very familiar comraderie. There is no question that coarse language is used and that no one is generally terribly offended by it nor takes offense to it. This is after all a fire house, not a cathedral or an elementary school.

The grievant was told by the outgoing shift Captain that he would take care of the oncoming Captains absence and call for another Captain to take charge of the training. Instead of following that effective direction, the grievant took it upon himself to use the PA system which broadcasts over the entre station to announce that the oncoming "piece of shit Captain" had called in sick again, or words to that effect.

The evidence showed that while there were no members of the public present nor any other city workers there, the grievant did not verify that. Had there been anyone within earshot this comment would certainly have placed the City in a very embarrassing situation.

It was also clear that many of the employees who heard this comment cringed since they felt it was disrespectful to the captain. There was some evidence that the words "piece of shit" in reference to the captain were used again in the meeting room as well. The evidence also showed that it was to some degree an accusation of misuse of sick leave, or even fraud, i.e. that the Captain had faked an illness or injury in order to skip training. This allegation turned out not be true.

The Chief, upon hearing about this entire scenario and as part of his investigation of the events, drove around town until he actually found the captain entering a drug store to purchase pain killers that he needed to treat a back injury. Thus, while the question of whether the captain had an actual illness or injury is not strictly material to the facts here. As noted, the evidence showed that he was in fact not faking at all.

After the PA comments, the grievant did not leave well enough alone. He then entered the shift meeting room and continued to engage other employees in a fairly strident way, to persuade them to be as outraged as he was about the captain calling in sick.

There was very little evidence as to what he actually said during this conversation but it was clear he spent several minutes in the room and that at the very least annoyed people. There was insufficient evidence that he actually intimidated people in the meeting room but it was clear that he made people feel uncomfortable.

After leaving the meeting room he encountered Firefighter Myers in the garage bay and again attempted to engage him in the same sort of conversation. The grievant berated the Captain and when Firefighter Myers indicated that he did not agree, the grievant called him a "f**king idiot and stormed away. The evidence showed that Myers was not intimidated by this but felt as though the grievant was trying to bully him, See Joint Exhibit 1.

This was investigated by the department and it was determined that the grievant in fact made the statements as alleged. Some 17 employees were interviewed and it was clear the grievant made the statements as alleged.

The grievant later wrote a letter in which he claimed to have apologized and even offered to resign as local union president. A review of the letter showed that it was less an apology and as much a re-argument of his original point that the Captain should have been there and that he stood by his original assertion in that regard. There was in effect no truly sincere apology for his actions in calling the Captain a "piece of shit" behind his back and to the shifts that were present that day.

There was also some evidence that relations have been somewhat strained between the union and management. See union Exhibit 2, which outlines some the frustrations on both sides at the lack of progress in labor management meetings. It was clear that while relations have been stressed, there was insufficient evidence to establish that the City skewed the investigation or that the decision was motivated by anti-union animus or anything personal to the grievant himself.

The City determined that the grievant's conduct violated the City' Respectful Workplace Policy and that a written reprimand as well as a one-day unpaid suspension was the appropriate penalty. The letter also set forth a number of other conditions as follows:

1. On or before October 16, 2015, you must meet with an Employee Assistance counselor for training and consultation regarding appropriate workplace behavior in a respectful workplace. …
2. You must refrain from acting in a defensive or argumentative manner with employees of the City and other individuals you may encounter while performing your duties.
3. During the course of your employment you must refrain from utilizing vulgar language when referring to supervisors, co-workers and other individuals.
4. You must abide by Red Wing's Respectful Workplace Policy. This includes but is not limited to refraining from using expletives or engaging in other offensive remarks or conduct. Intimidation of others will not be tolerated.
5. On or before October 16, 2015, you must review the City's Respectful Workplace Policy again and must sign off on the Policy indicating that you have read it and will comply with it.

The grievant attended the counseling referenced in paragraph 1 and signed off on the re-review of the Respectful Workplace Policy. The others will be discussed below.

The union filed a grievance over the imposition of the above referenced discipline that was processed through the grievance steps. The parties agreed that there were no procedural issues and that the matter was properly before the arbitrator. It is against that general factual back drop that the analysis of the matter proceeds.

THE USE OF THE PA SYSTEM

As noted above, the grievant use of the PA system to announce that the shift's "piece of shit Captain" had called din sick was a violation of the City's policy and was a disrespectful statement that essentially accused the captain of faking an illness.

The union asserted that there was no specific prohibition against this in the Respectful Workplace Policy and that without such a specific reference the grievant was not on proper notice that he could be disciplined for this action. The union also asserted that use of sometimes vulgar language is common and that this was nothing more than mere shop talk. Finally, the grievant asserted that this was a joke and should not and did not offend anyone who heard it.

First, the City policy does not provide that the sole grounds for discipline must be specifically contained in the list of offenses in the policy. As Arbitrator Fogelberg noted in *Teamsters Union, Local 346 and the City of Pequot Lakes, Minnesota*, BMS 13-PA-0706, (Fogelberg 2013), "common sense does not need to be codified in a policy or procedural manual in order to find misconduct." Here that admonition applies with equal force. Accusing your Captain of falsifying an illness in order to skip out on training is a serious accusation and it was of little wonder that some people cringed when they heard it. Moreover, the policy itself gives discretion to the City to impose discipline based on the facts of an individual case. As discussed more below, there was little question that the use of the PA system in this manner was inappropriate. It was also noted that the grievant later tried to apologize for it and acknowledged that it was the wrong thing to do. Thus, the claim that there was inadequate notice based on the policy itself failed due to lack of evidence and based on the language of the policy itself.

Second, it was shown that the employees do use foul and coarse language with each other. However, the vulgar language was not the sole basis of the discipline; rather it was the use of the PA system to engage in highly disrespectful behavior toward a superior officer. This was especially significant in a paramilitary organization such as a fire department.

Finally, the assertion that this was a mere joke rang hollow on this record. It was plainly apparent from the overall record that the grievant was not joking at all when he made the statement and no one took it as a laughing matter. This was supported by the grievant's subsequent actions as well in coming into the meeting room to elicit support for his position and his continued attempt to persuade people to his point of view.

On this record, the evidence established that there was a clear violation of the policy by the use of the PA system to make the statement the grievant made that day. That was not the only thing that happened that day to warrant discipline.

THE GRIEVANT'S ACTIONS IN THE MEETING ROOM AND LATER WITH ANOTHER FIREFIGHTER IN THE GARAGE BAY

As noted above, after making the PA announcement, the grievant took it upon himself to enter the meeting room where the shifts were located and confronted other employees about the captain's absence. There was a paucity of evidence about what exactly he said when he arrived there but there was some evidence that the words "piece of shit" in reference to the captain were said again there although it was not clear how many times. There was also evidence that he continued to berate the Captain, who was of course not there to defend himself or provide any counter to the claim that he was not ill that day.

The evidence showed that few if any of the other employees were truly intimidated or scared of the grievant but they were at least somewhat annoyed at his continued tirade against the Captain and his efforts to persuade them to his view.

Again, there is nothing in the policy that specifically mentioned such action but on this record there need not have been. His actions were again inconsistent with the Respectful Workplace Policy and were disrespectful to the captain and to the rest of the employees.

On this record there was adequate evidence of a violation of the policy by the grievant's actions in continuing to extend his verbal comments about the Captain instead of going through appropriate channels and chain of command. He had other options but chose to do it this way.

The union asserted that the City provided no direct evidence of anyone being offended or intimidated by the grievant's comments. The simple answer is that the City was not required to. As in any case involving inappropriate conduct, the question is not so much whether anyone was frightened or intimidated or even offended but rather whether they could have been due to the nature of the comments. The other calculation is whether the comments were disrespectful. There is no question that they were. It was also noted that on the one hand the grievant sought to apologize for these comments but on the other hand continued to maintain that he was justified in making them due to the need to attend training. This position was entirely internally inconsistent. While it is completely understandable that the grievant wanted everyone to attend the training, his frustrations with the captain should have been taken up through chain of command. Instead he engaged in what can only be termed "self-help" and did so in an entirely inappropriate way.

CONFRONTING ANOTHER FIREFIGHTER IN THE GARAGE BAY

After leaving the meeting room the grievant happened upon Firefighter Scott Myers in the garage bay of the station. There he angrily confronted him as well and continued to discuss the situation with the captain. Mr. Myers submitted a statement to management about this incident that showed that while he did not feel intimidated he believed that the grievant was attempting to bully him into agreement with his position. When Firefighter Myers would not get involved or take a position consistent with the grievant's in regard to the Captain, the grievant called him a "f**king idiot" in a loud voice and stormed away. It was clear that Firefighter Myers was annoyed by having been "cornered' as he termed it and with the ongoing outbursts and with their frequency. It was clear that while this did not rise to the level of intimidation, it was again disrespectful of both Firefighter Myers and to the Captain involved, who again was not there to defend himself against these accusations.

Again, the language used was only one of the issues. It was clear from this record that language of this nature is used around the station frequently and that nobody is terribly offended by it. Firefighter Myers acknowledged that he has said this as well and that while the name calling did not bother him, the context did. His statement as well as his testimony spoke volumes about the frustration over the grievant's approach when people do not agree with him.

On this record this too was a violation of the policy and constituted grounds for discipline.

OVERBLOWN INVESTIGATION

The union asserted that the investigation was overblown when compared to other situations involving disciplinary action. In one case the City interviewed only 2 employees involving a complaint about response time yet here they interviewed 17 employees. This was frankly a somewhat curious allegation for the union to raise. Generally, unions complain that the investigation was lacking in some fashion or that the employer failed to interview all the relevant witnesses to get the whole story. Here the City interviewed what appeared to be almost everybody involved in this in order to ascertain the facts and get the whole picture.

Here was no evidence that the investigation was skewed in any way or that the City developed a foregone conclusion and used a trumped up investigation to support that preordained conclusion. Neither was there any evidence of anti-union animus – discussed more below – or that the investigation ignored relevant facts in order to find or fabricate grounds for discipline.

The evidence showed that the City even investigated whether the Captain really was sick that day and the Chief found him at a drug store buying pain medication to alleviate the effects of a back injury. The mere fact that the City conducted a more thorough investigation than the union thought necessary is not on these facts a valid defense. Determining all relevant facts is what the investigation is for and the evidence here showed that the City conducted a very thorough one. On this record this allegation did not provide a valid defense to the action taken nor did it undercut the evidence of misconduct by the grievant.

DISPARATE TREATMENT

The allegation of disparate treatment was one of the main legs of the union's argument. They raised several instances that it alleged showed that the grievant was being treated more harshly than others in similar situations. Disparate treatment along with the assertion of lax enforcement of rules, which are related in some ways, can be valid defenses to disciplinary actions.

Where it can be shown that the employer has either been lax in enforcement of its rules and has let other employees do things without consequences that it now wants to discipline the employee at hand, arbitrators will overturn or mitigate disciplinary consequences. The obvious question is whether there has in fact been lax enforcement or whether the cases the union seeks to compare to the instant case are in fact so similar that they deserve similar treatment. Where the cases are different, the results can be different, either because of the nature of the action or the overall circumstances of the case.

Here the cases cited by the union revealed that either management was unaware of the other cases and therefore was not on notice of the conduct and could not therefor take appropriate action or that the cases were sufficiently different that they do not control the result here.

The union noted several specific allegations in the original grievance. On this record, the evidence showed that the Chief was not aware of the allegations in bullet points #'s 2 and 4 and that he did not recall the allegations in #1 wherein one employee made an off color comment about bestiality by another employee. The former Chief also testified that he did not recall the allegations contained in #3 and #5 either. Significantly, while these allegations were raised in the orginal grievance, there was insufficient actual evidence on this record to refute the Chief's testimony that he was unaware of these, despite the assertion by the union that he was present for some of these. The former Chief testified credibly that he was unaware of these incidents and no one reported them to him. Here however, someone did and expressed concern about the grievant's actions and his workplace demeanor.

The union also noted that the City Administrator herself used the word "bullshit" in response to a statement made during a labor management meeting to the effect that "if you work of the City of Red Wing, you just don't care," or words to that effect. She reported this herself though and received a verbal warning from the council. She testified though that had she made a public statement calling a council member a "piece of shit" she would expect to be fired.

The union also noted that in one instance the Chief made an off color statement to an employee to get down on his knees in order to demonstrate knee pads. The distinction is that this was a joke that went badly. It was not intended to be a derogatory statement and the Chief immediately and sincerely apologized for it. The evidence also showed that the employee was satisfied with the apology and nothing more came of it. Further, this was a very different comment made in this instance and one that was a serious attempt to deride a superior officer. Here the statements were made multiple times, in a very public way and the apology as discussed herein was something less than completely genuine.

The union alleged that one firefighter swore at another once and even threw something at him yet received no discipline. The former Chief also expressed no knowledge of this incident and there was insufficient evidence to refute that on this record.

After a review of the cases cited by the union in support of the claim of disparate treatment it was determined that these cases were either not brought to the attention of management so that an investigation and action could be taken or that they were a very different sort of action. None of the cases cited by the union involved the use of a PA system to call a superior officer a "piece of shit" and none was shown to have been a deliberate attempt to undermine the authority and integrity of a fellow officer. The grievant's statements were made without knowing why the captain had called in sick and even he acknowledged that they were inappropriate.

THE CLAIM OF DUE PROCESS VIOLATIONS

The union raised a question of new evidence being introduced at the hearing and that there was a violation of the grievant's due process rights as a result. Where it can be shown that the union or the grievant was prejudiced by the manner in which the employer presented the allegations just cause may not be supported. The employer cannot lie in wait and ambush a grievant or a union by withholding evidence from them and springing it on them without notice at the last minute.

Here though that is not at all what occurred in the processing and investigation of this action. While the City could perhaps have been a little clearer outlining exactly what the grievant was being charged with, on this record it was quite apparent what the charges were and why he was being disciplined. There was insufficient evidence to support the claim that the union was somehow prejudiced by the City's actions or the notices that were sent in support of its disciplinary action against the grievant. There was further insufficient evidence that his due process rights were violated. It was plain from the beginning what the grievant was charged with, what policies he allegedly violated and why the City was taking the action. The union was afforded ample time and opportunity to prepare and present a defense to all of this. Accordingly, the claim that there was a violation of the grievant's due process rights failed due to lack of sufficient evidence to support it.

THE GRIEVANT'S POSITION AS UNION PRESIDENT

The union also asserted that the grievant's position as union president coupled with the tense relations between the parties led to the decision not only to impose discipline at all but also the decision to impose this level of discipline. The union cited *Arden Farms Co*., 45 LA 1124, 1130 (Tsukiyama, Arb.) (1965) for the proposition that it is incumbent on an arbitrator in determining just cause to review whether the grievant's position with the union was a motivating factor in the employer's decision to impose discipline.

Arbitrator Tsukiyama cited an earlier decision in *Bates Lumber Co.*, 65-1 ARB 8222 (Abernethy 1964) as follows:

> Discipline or discharge of an employee in the dual status of an employee and a union representative frequently poses the dilemma found here, and presents a significantly more difficult problem of determining just cause than the discipline or discharge of one who serves solely in the capacity of an employee.

The union also cited *State of Ohio,* 99 LA 1169, 1173 (Rivera 1992). for the proposition that in such cases where the employee also serves as a union official, "the arbitrator is obliged to make a thorough search and examination of the entire record to ascertain and satisfy himself that Management has not violated the collective bargaining agreement in this manner."

It is therefore necessary to review the facts and determine if the grievant's position with the union was a motivating factor for the discipline itself and/or for the level of discipline. The union asserted that it was both and that the decision to impose discipline was motivated by the tense relations between the parties in the months just prior to the August 27th incident and that the grievant was treated more harshly due to his position. Neither of these was supported by the evidence in this case.

First, the grievant was not acting in the capacity of union president at any time material to this discussion. While he felt strongly about safety and attending mandatory training and his motives for wanting everyone there were certainly admirable, he was not acting as a union official in making the PA announcement nor in the manner in which he confronted the other employees. He thus did not enjoy the immunity that commentators and arbitrators have for many years extended to union officials. When they are acting as union officials the normal employee/employer relationship is temporarily dissolved and the two are equals. Here though the underling conditions precedent for that to be the case were not established.

Second, there was insufficient evidence to establish that the City's motives were to undermine the grievant's position as a union official. In fact, the letter from the City Administrator, Joint exhibit 4, praised him for his service to the City and on behalf of the union. The City Administrator also agreed to his request to use accrued time to serve the suspension instead of taking it as unpaid time. She further gave him credit for his role as a zealous advocate of the union and for working cooperatively to move the fire department forward

On this record there was simply insufficient evidence to establish that the City treated the grievant more severely because of his union status. The City's motivations were shown to have been related to the grievant's actions alone.

THE APPROPRIATE PENALTY

Part of any just cause analysis is the determination of whether the penalty was appropriate given the proven violation. The union argued that a written reprimand and suspension may only be used if the listed offenses set forth in their brief are specifically shown. This is too limited a reading of the provision and is also inconsistent with the other provisions of policy which allow for some deviations in the degree of discipline imposed in certain cases. There was merit to the City's claim that it has the discretion to impose a more severe discipline if the circumstances warrant it. Here the question is whether the City's actions are arbitrary or unreasonable given the proven offense.

On this record the written reprimand and suspension were not shown to be so unreasonable as to warrant overturning them. While they were somewhat more severe than other cases, so too were the grievant's actions shown to be somewhat more offensive and inappropriate. It must be remembered that he used the PA system, assuming that no one other than firefighters were within earshot, to call a member of command staff a "piece of shit." That was frankly an assumption that could have placed the City in a very embarrassing position had the grievant guessed wrongly.

Here it was clear that the grievant's actions violated the City policy and that he acted in a somewhat impetuous and cavalier manner. I was not unmindful of the sometimes jocular nature to the work environment and that employees engaged in ribbing of one another. This is not unusual but when that crosses the line to outright disrespect and even the allegation of fraudulent use of sick leave the joke ends. Here the grievant not only violated the policy by his inappropriate use of the PA system but also in his continued verbal engagement with people who did not appreciate his comments or the somewhat strident and aggressive manner in which he approached them.

The question now is whether the penalty of a written reprimand and a one-day suspension was unreasonable or arbitrary. On these unique facts, while that may seem somewhat harsh given the history of this department a CIT must set a better example for the line officers and unlicensed staff working within the department. These facts did not establish that those two items were so unreasonable as to warrant mitigating them or overturning them. Neither was the imposition of both a written reprimand and a one-day suspension outside of the scope of the discretion granted to the City as to warrant a lessening by an arbitrator of those penalties.

The union asserted that this type of language at play here is used commonly, but what is at issue here is not so much the language used, although that was certainly a large piece of the puzzle, but rather the clear intent to embarrass and even accuse a Captain of fraudulently using sick leave. This act of disrespect and a not so thinly veiled accusation of fraud by a Captain within the fire department was more egregious than other cases presented on his record. It thus called for a more severe penalty.

Discipline should be corrective in nature and not be merely punitive. Here the facts showed that the penalty may have had the desired effect and demonstrated to the grievant the need to be more appropriate in his workplace demeanor. His apology, while not perfect, was a step in that direction and showed that he now understands the need to think before acting and that he had better know the facts before making accusations about the motives of other people. In that regard the discipline was corrective. Further, the mere fact that the discipline worked is hardly grounds for overturning it, lest the desired effect be negated. Here the suspension and reprimand will not be disturbed.

Having said that though, there are several conditions in the disciplinary letter that appear to run afoul of the grievant's rights as a union member and as a union official and which could potentially violate his rights to concerted activity. Specifically items 2, 3 and 4 listed on page 2 of the disciplinary letter are to be stricken from the grievant’s file and the letter modified to reflect that.

These conditions could well be read to chill the grievant's rights to concerted activity under PELRA and are potentially contrary to the stated policy of the State of Minnesota under PELRA. See e.g. Minn. Stat. 179A.06 subds 1 and 7, guaranteeing the rights of employees to concerted activity and to express their views. The employee is of course still subject to the obligations imposed on all City employees under the City's policies. Unless he acts as a union official as noted herein, the grievant enjoys no special rights or privileges in that regard but future determinations must await future facts as yet unknown. However, to chill his rights under the terms of the disciplinary letter appear to have stepped on the rights guaranteed under PELRA and under the authority to fashion a remedy, those are to be stricken.

Thus the extent that the reprimand and suspension are to remain the grievance is denied. To the extent that that portion of the union's request expunging certain portions of the disciplinary letter the grievance is sustained in part.

ATTORNEYS FEES

The final issue is the question of attorneys fees. Given the determination above, no fees will be awarded. Having made that determination, it is unnecessary to delve into the somewhat interesting question of whether PELRA and the parties labor agreement even allows the arbitrator the discretion to award such fees. On these facts no fees would have been awarded even if through some reading of the Uniform Arbitration Act and PELRA such discretion was to be authorized. It appears highly unlikely given the terms of the labor agreement and PELRA itself, from which the power to bargain collectively derives in the first place, that such fees would be awardable under any circumstances. Here though the claim for expenses and fees to the union is specifically denied. The parties are to share equally in the cost of the arbitration and are to bear their own costs and attorneys fees.

AWARD

The grievance is DENIED IN PART AND SUSTAINED IN PART. The written reprimand and suspension are left in place and will not be disturbed. The conditions set forth at bulleted paragraphs 2, 3 and 4 of the disciplinary letter, Joint Exhibit 2 herein are specifically to be stricken from the discipline as noted herein.

Dated: July 25, 2016

_____

Jeffrey W. Jacobs, arbitrator

City of Red Wing and IAFF AWARD 2016.doc